

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 65 OF 2006
With
SECOND APPEAL NO. 66 OF 2006
With
CIVIL APPLICATION NO. 4585 OF 2006
With
CIVIL APPLICATION NO. 4587 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the Civil Judge?

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SHANTABEN - WD/O JAYANTIBHAI
SOMABHAI PATEL - Appellant(s)
Versus
PATEL BIHARIBHAI DAHYABHAI
(SINCE DECEASED THROUGH HEIR) & ORS. - Respondent(s)

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Appearance :

MR. SURESH M. SHAH with MR. MEHUL S. SHAH for Appellant(s).
MR. S.N. SHELAT, SR. COUNSEL, with
MR. HARSHADRAY A. DAVE for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 26/07/2006

COMMON ORAL JUDGMENT

This judgement shall finally dispose of Second Appeal Nos.65 of 2006 and 66 of 2006.

2. The plaintiffs-respondents filed two separate suits before the trial Court seeking specific performance of the agreement/contract submitting, *inter alia*, that the plaintiffs and the defendant (since deceased) entered into an agreement for sale of the property and as the defendant was refusing to perform his part of the contract, and as the plaintiffs were always ready and willing to perform their part of the contract, a decree be granted in their favour.

The defendant contested both the suits on almost every possible ground and also raised a plea that the agreement entered into between the parties was bad because the property belonged to the joint Hindu family and the plaintiffs could seek 1/6th share only in the property. After casting of issues, the two suits were consolidated; the parties were allowed to lead evidence, oral and documentary; and, after hearing the parties, the trial Court decreed both the suits holding, *inter alia*, that the plaintiff was acting as a Karta of the joint Hindu family and as he was even otherwise disposing of some other property belonging to the joint Hindu family for legal necessity, the agreement entered into between

the parties was also for a legal necessity and as the plaintiff was always ready and willing to perform his part of the contract, the plaintiff was entitled to a decree in his favour. The suits were accordingly decreed. It appears that during pendency of the suits, the original defendant died and his legal representatives are substituted in his place. It was brought to the notice of the trial Court that during the pendency of the suit, a partition was effected amongst the members of the joint Hindu family and as the original defendant received only 1/6th share in the property, the suit could not be decreed to its fullest extent. The trial Court, while decreeing the suit, held that the partition was effected during the pendency of the suit; it would be hit by the principles of *lis pendens*; the partition, as a subsequent event, would not affect the rights of the plaintiffs and each of the defendants would be liable to execute the sale deed in favour of the plaintiffs for the entire property as if no partition had taken place.

3. Being aggrieved by the said two judgements, the defendants preferred two separate appeals. As the appeals had arisen out of the common judgement, those were heard simultaneously and were disposed of by a common judgement. The learned Appellate Court confirmed almost every finding of the learned trial Court and held that

the original defendant entered into the agreement as a *Karta* of the family, there was legal necessity and the partition during the pendency of the suits would not affect the rights of the original plaintiffs. It dismissed both the appeals.

4. Being aggrieved by the said judgements and decrees, Second Appeal Nos.65 and 66, both of 2006, have been filed.

5. Mr.S.M.Shah, learned Counsel for the appellants, submitted that the Courts below were unjustified in entering into the question that the suit document was executed by the defendant in his capacity as a *Karta* and that there was legal necessity in absence of substantial and material pleadings on the part of the plaintiffs. His submission is that any evidence brought on the record cannot be looked into unless foundation is created by providing proper pleadings in the matter.

6. After hearing the learned Counsel for the appellants, I admit the appeals on the following substantial question of law :

“Whether on the facts and in the circumstances of the case, the Courts below were justified in

deciding the question that whether the suit agreement was entered into between the parties and the suit agreement was signed by the defendant in his capacity as Karta of the family and that there was a legal necessity to sell the property?"

With the consent of the parties, I have heard the matters finally.

7. Mr.S.M.Shah, learned Counsel for the appellants, had taken me through the records, specially, the pleadings, and submitted that there are no pleadings to the effect that the agreement was entered into between the parties and the same was signed by the defendant as *Karta* of the family. He referred to certain admissions made by the plaintiffs wherein the plaintiffs had admitted that the defendant signed the document in his personal capacity. After taking me through the pleadings, he also submitted that the question of legal necessity was required to be raised because the said question would depend upon the facts and circumstances of each case. According to him, the question of legal necessity cannot be decided simply on the basis of the pleadings, but, can be decided on a pleading, coupled with the positive proof that what was the legal necessity.

8. Mr. Shelat, learned Senior Counsel for the respondents, on the other hand, after going through the pleadings, fairly submitted that the pleadings regarding the original defendant being a *Karta* and there was a felt need or there was a legal necessity, are not available in the plaint. He, however, submitted that if the parties are alive to the dispute and were leading evidence and in absence of the pleadings, no surprise is occasioned to the defendants, then, absence of the pleadings would not make any material difference.

9. So far as the question of raising pleading in support of a factual aspect is concerned, the law is settled on the subject. Where a particular fact, which relates to a factual position, is required to be pleaded, then, in absence of such pleading, it would not be expected from the other side that being aware of such fact, they would start giving reply in the written statement. The question that the defendant was acting as *Karta* of the joint Hindu family would be a question of fact. The plaintiffs were required to plead and prove in so many words that the defendant either admitted in writing or made it clear by his action or gestures or by some contemporaneous writing that he was acting as *Karta*. So far as the question of legal necessity is concerned,

when a purchaser proposes to purchase a property belonging to a joint Hindu family, then, he is required to enquire from the seller that the seller is acting in the capacity as a representative of the entire family or as *Karta* and whether there is a felt need or legal necessity.

10. The question of legal necessity cannot be decided in air. Legal necessity is a term which appears to be legal in its formation, but, the answer to the question of legal necessity would always depend upon the facts. In a given case, a particular necessity may be a legal necessity, but, in a different case, the same necessity may not be a legal necessity. In absence of such pleadings from the side of the plaintiffs, it was not expected of the defendant to contest the matter properly. Simply because at the time of the evidence, the plaintiffs started asserting that there was legal necessity, it would not satisfy the legal requirement of the pleading and proof.

11. It is trite to say that evidence, which is not supported by a pleading, would not be looked into. Under the circumstances, in absence of such pleadings from the side of the plaintiffs, the Courts below could not look into the said evidence.

12. At this stage, the learned Counsel for the respondents-plaintiffs submitted that they led evidence on different aspects and no objection was raised by the other side, they were misled by the fact that the fact was within the notice of the defendant. He submits that in a case like present, where the Courts have held in favour of the plaintiffs, the cause should not be allowed to be defeated because of a technical defect. He submits that in a case like present, both the matters deserve to be remanded to the trial Court with liberty in favour of the plaintiffs to amend the pleadings and the right in favour of the defendant to file reply to the amended pleadings and a further direction to the trial Court to cast additional issues and give proper opportunity to the parties to lead evidence on those issues only and decide the matter afresh.

13. Mr.S.M.Shah, learned Counsel for the appellants-defendants, accepts the said proposal. He submits that if the judgements and decrees passed by both the Courts are set aside and the matters are remanded back to the trial Court with liberty in favour of both the parties to amend their pleadings and with further opportunity to lead further evidence on the additional issues only, then, he would have no objection.

14. Under the circumstances, the question framed at the time of admission is to be answered in favour of the appellants and the judgements and decrees passed by the two Courts below are required to be set aside. Those are accordingly set aside. In view of the submissions made by Mr.Shelat and conceded to by Mr.Shah, I remand both the matters back to the trial Court with liberty in favour of the plaintiffs to raise additional and further pleadings, with a further right in favour of the defendants to make consequential amendment/s in accordance with law. After such an amendment and consequential amendment/s are incorporated, the trial Court shall frame additional issues and would grant liberty to both the parties to lead further evidence on those issues only. After the parties lead their evidence, they would be given an opportunity of hearing. After hearing the parties, the trial Court shall decide the matters in accordance with law. The parties shall appear before the learned trial Court on 18th September, 2006. No costs.

15. As the appeals have been allowed, no orders on Civil Application Nos.4585 of 2006 and 4587 of 2006 are required.

[R.S.Garg, J.]

*kamlesh**